Office - Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1538 and 80-1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, *et al.*,

Appellants,

v.

J. AND R. DOE, as Guardian Ad Litem for I. DOE, *et al.*,

Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,

Appellants,

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN,

Appellees.

Consolidated Appeals From The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE THE LEGAL AID SOCIETY OF SAN FRANCISCO

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QUESTIONS PRESENTED

1. Does the Plain Language of the Equal Protection Clause of the Fourteenth Amendment Which Prohibits a State From Denying Equal Protection of the Laws to Persons Within Its Jurisdiction Cover Undocumented Children?

2. Does Section 21.031 of the Texas Education Code Which Effectively Denies Undocumented Children Residing in the State of Texas a Public Education Guaranteed to Lawfully Resident Alien and Citizen Children Constitute a Denial of Equal Protection of the Laws?

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In The Supreme Court

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NOS. 80-1538 AND 80-1934

PLYLER, et al.,

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STATE OF TEXAS, et al.,

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vs.

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,

Appellees.

BRIEF OF AMICUS CURIAE

STATEMENT OF INTEREST

The Legal Aid Society of San Francisco [hereinafter the Society] is a private non-profit corporation organized under the laws of the State of California providing legal services to persons who could not otherwise afford them. In addition to providing direct services to individuals in need of legal representation, the Society maintains a role in addressing public issues which impact on the rights of the individuals and groups it represents.

Among the major issues and cases in which the Society has been involved are: Lau v. Nichols, 414 U.S. 563 (1974) wherein this Court recognized the right of monolingual Chinese speaking students to equal educational opportunities in the San Francisco public schools; and Hampton

v. Mow Sun Wong, 426 U.S. 88 (1976) which involved equal access to Federal employment for resident aliens. The Society has the requisite expertise and interest to address the issues presented by the consolidated cases before the Court today.

QUESTIONS PRESENTED

1. Does the Plain Language of the Equal Protection Clause of the Fourteenth Amendment Which Prohibits a State From Denying Equal Protection of the Laws to Persons Within Its Jurisdiction Cover Undocumented Children?

2. Does Section 21.031 of the Texas Education Code Which Effectively Denies Undocumented Children Residing in the State of Texas a Public Education Guaranteed to Lawfully Resident Alien and Citizen Children Constitute a Denial of Equal Protection of the Laws?

STATEMENT OF THE CASE

Amicus relies on the Appellees in this consolidated appeal to set out the full factual setting of these cases.

ARGUMENT

Amicus Curiae respectfully urges that judgments below be affirmed. The plain language of the Equal Protection Clause and relevant case law establish that undocumented children are covered by the guarantees of equal protection of the laws. The Courts below correctly found that Texas Education Code §21.031 which effectively denies undocumented children residing in Texas access to public education guaranteed to citizen and lawfully resident alien children was a denial of equal protection of the laws. Such a

result is consistent with constitutional values of fairness.

Texas Education Code Section 21.031 is preempted by Federal law. Under the tests developed by this Court, the Texas statute deals with an area that is the exclusive province of the Federal government in that the statute places burdens on children whom the Federal government has allowed to remain within the United States. Furthermore, the statute is preempted in that it unduly burdens both Federal Immigration and Education policies by denying a group of alien children access to education.

I. THE GUARANTEES OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT EXTEND TO UNDOCUMENTED CHILDREN AS WELL AS CITIZEN AND LAWFULLY RESIDENT ALIEN CHILDREN.

The Fourteenth Amendment in pertinent part provides:

> "No state shall ... deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV [emphasis added]

The Court of Appeals, below, held that:

> "... [a]ll aliens - even those illegally within the territorial boundaries of the United States are entitled to the equal protection of the laws." Doe v. Plyler, 628 F.2d 448, 454 (5th Cir. 1980).

This holding was followed in the Fifth Circuit's summary affirmance in In Re Alien Children Education Litigation, ___ F.2d ___ (5th Cir. 1981).

It is clear from opinions of this

Court that the due process protections of the Fourteenth Amendment extend to aliens, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), even if they are in the United States illegally or without documents. Mathews v. Diaz, 426 U.S. 67, 77 (1976); Shaughnessy v. United States, 345 U.S. 206, 212 (1953). The Fifth Circuit's holding in Doe v. Plyler, supra, extends the Fourteenth Amendment protections afforded illegal aliens to include equal protections for undocumented children.

The language of the Equal Protection Clause is straight forward and reads that "all persons within the jurisdiction of a state" are afforded the equal protections of the law. (emphasis added) 1/ It is

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1/ Such protection "is a command which the State must respect, the benefits of which every person may demand", the least deserving as well as the most virtuous. Hill

(continue next page)

firmly established that aliens, adults or children, lawfully admitted into the United States are persons and as such are afforded the guarantees of the Equal Protection Clause of the Fourteenth Amendment for purposes of reviewing state action. 2/ We will not burden the Court with reiterating the reasons why the Equal Protection Clause of the Fourteenth Amendment protects undocumented aliens as that is set out in Appellees' briefs and was the ruling of the Fifth Circuit in Doe v. Plyler, supra, 628 F.2d at 454-56.

1/ (cont. from previous page) v. Texas, 316 U.S. 400, 406 (1942).

2/ Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Board v. Flores de Otero, 426 U.S. 572 (1976); In Re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

See also Bolanos v. Kiley, 509 F.2d 1023, 1025 (2nd Cir. 1975).

This Court is not asked to determine that illegal aliens in all situations are protected by the Equal Protection Clause. Rather this Court is being presented with a narrow question of whether children of illegal aliens, who are undocumented by virtue of their parents' status alone, are to be granted the fundamental guarantees provided by the Equal Protection Clause. 3/

3/ In the specific circumstances of this total denial of educational opportunities to undocumented children, we agree with the statement of the Fifth Circuit rejecting the proposition that due process guarantees, to which these children are undeniably entitled, are somehow more basic to "our constitutional scheme" than guarantees of equal protection. Doe v. Plyler, supra, 628 F.2d at 456 n. 18. Compare Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

The undocumented children in the cases at bar, although not lawfully admitted aliens, are under no order of deportation, are not necessarily deportable, and are likely to remain permanently in this country. Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1328 (1980)(Powell, J., in chambers). These children owe their place of residence to the actions of their parents. 4/ This Court has recognized the need to afford illegitimate

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4/ The State of Texas by statute recognizes the authority parents exercise over their children, [Texas Fam. Code §12.04(1) (Vernon Supp. 1980)], and grants parents the right to have physical possession of their children and the right to determine or establish the legal residence of their children. Additionally, §12.04(2) of the Texas Family Code imposes a duty on parents to control their children.

children the coverage of the Equal Protection Clause when they are denied benefits through no fault of their own. 5/ Similarly, undocumented children residing within this country should not be denied equal protection due to actions over which they had no control. Recognizing that undocumented children are covered by the Equal Protection Clause is consistent with underlying constituional values of fairness.

5/ Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating an Illinois statute that totally barred illegitimate children from inheriting from fathers who died intestate); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (invalidating state statute that denied dependent illegitimate children recovery under worker's compensation law for the death of their father); and Levy v. Louisiana, 391 U.S. 68 (1967) (invalidating provisions of the Louisiana wrongful death statute excluding illegitimates from the class of children entitled to recover for a parent's death.

To deny these children the equal protection of the law would in effect doom them to a life of the most marginal nature. As the court below stated:

> "[D]enying a person a basic education is tantamount to ensuring that the person remains at the lowest socio-economic level of modern society, ..." Doe v. Plyler, supra, 628 F.2d at 451. 6/

The treadmill of social and economic oblivion to which they would be relegated without education could lead to a life of crime, delinquency and despair. The action of the State of Texas, in an attempt to save money now, could:

> "develop and foster a ghetto of ignorance, with ... untrained and untutored ... children ... roaming the streets, this with the concomitant evils of crime,

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6/ See also Id. at 451 n. 8.

immorality and general social degeneracy." Hosier v. Evans, 314 F. Supp. 316, 321 (D.V.I. 1970).

II. TEXAS EDUCATION CODE SECTION 21.031 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. STRICT SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW FOR SECTION 21.031.

The State of Texas, by enacting Section 21.031, has created two classes of children. The first class is made up of children who are citizens or lawfully admitted aliens who are eligible for tuition free education, irrespective of whether their parents contributed to the financial base of the Texas public schools. The second class is composed of non-citizen alien children who are in the United States without legal documentation and are not eligible for

tuition free education even if their parents contribute to the tax base that supports public education in Texas. As detailed below, there are three separate bases for finding that this second class of children is entitled to have this Court strictly scrutinize the discrimination wrought by Section 21.031.

1. Undocumented Children Are Within The Class 'Aliens' For Purposes Of Determining Appropriate Standard Of Review.

The classification of undocumented children created by Texas Education Code Section 21.031 [hereinafter referred to as §21.031] is based on alienage. Decisions of this Court have established that state created classifications based on alienage are inherently suspect and subject to close judicial scrutiny.

Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); Mathews v. Graham, 403 U.S. 365, 372 (1971); Examining Board v. Flores de Otero, 426 U.S. 572, 601-02 (1976); In Re Griffiths, 413 U.S. 717, 721 (1973); Sugarman v. Dougall, 413 U.S. 634, 642 (1973). 7/ This is in recognition of

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7/ This Court has acknowledged a limited exception to this rule in Amback v. Norwick, 491 U.S. 68 (1979) and Foley v. Connelie, 435 U.S. 291 (1978). In those cases a more relaxed standard of review was applied to instances in which a state excludes aliens from participation in the political community. The rationale for those decisions is that some "state functions are so bound up with the operation of the State as a governmental entity" as to allow the exclusion of individuals who have not become part of the process of self-government. Amback v. Norwick, supra, at 73-74. The case before the Court today does not involve individuals who wish to participate as agents of the state in governmental operations as was true in Amback and Foley. The facts of this case are much more closely analogous to the facts in Graham v. Richardson, 403 U.S. 365 (1971), wherein this Court applied a strict scrutiny standard to a classifica-

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the fact that aliens, as a class, are a prime example of a "discrete and insular" minority, United States v. Carolene Products Co., 304 U.S. 144, 152-53, n. 4 (1938), and that it is appropriate to afford them heightened judicial solicitude. Graham v. Richardson, supra, at 372.

Section 21.031 is not saved from strict scrutiny simply because it does not burden all alien children. In Nyquist v. Mauclet, supra, this Court invalidated a New York statute that barred certain, but not all, aliens from state financial assistance for higher education. There the Court stated:

> "The important points are that [the statute] is directed at aliens and that only aliens

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7/ (cont. from previous page)
tion based on alienage that was used to exclude individuals from eligibility for state welfare benefits.

> are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." 432 U.S. at 9.

Similarly, in Graham v. Richardson, supra, note 7, an Arizona statute with a 15 year residency requirement for aliens to be eligible for welfare benefits was struck down as violating equal protections guarantees. These cases make it clear that though a statute may create a classification which burdens only a portion of a protected group, it does not negate the fact that the classification itself is suspect. Mathews v. Lucas, 427 U.S. 495, 504-05 n. 11 (1976); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 169, 172 (1972). 8/

8/ See also Moreno v. Toll, 489 F. Supp. 658, 660-62 (D. Md. 1980).

Here, although the undocumented children are not lawfully admitted aliens, they are or will become permanent residents of this country. Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1328 (1980)(Powell, J., in chambers). To allow a state to discriminate against this group of aliens without compelling reasons would be contrary to this Court's prior holding regarding aliens.

2. The Distinction In §21.031 Singling Out Undocumented Children For Differential Treatment Is A Suspect Classification.

Second, the undocumented children discriminated against by Section 21.031 constitute a suspect class of individuals

based on criteria established by this Court. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1972) and United States v. Carolene Products Co., supra, at 152-53 n. 4. First, like aliens generally, they constitute a discrete and insular minority. See Graham v. Richardson, supra, at 372. Most undocumented children in Texas are of Mexican ancestry. 9/ Consequently, they share with other ethnic and racial minorities, physical, cultural, and language characteristics that set them apart from the Anglo majority and make them identifiable as a distinct group. (See

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9/ See Doe v. Plyler, supra, 628 F.2d at 451 n. 6. See also, Ortega, "The Plight of the Mexican Wetback", 58 A.B.A.J. 231, 251 (1972).

Keyes v. School District No. 1, 413 U.S. 189, 197-198 (1973).) Like undocumented aliens generally, undocumented children have historically been the target of purposeful legal, economic and social discrimination and exploitation. 10/ As a group, undocumented children, specifically, and undocumented aliens, generally, are politically powerless. San Antonio Independent School District v. Rodriguez, supra, at 28. Like lawfully resident aliens, undocumented aliens are not guaranteed the opportunity to vote and therefore cannot directly participate in the political process.

10/ See also Kane and Velarde-Munoz, "Undocumented Aliens and the Constitution: Limitations on State Action Denying Undocumented Children Access to Public Educaiton," Hastings Con. Law Quart., Winter 1978, text accompanying notes 50-55.

Sugarman v. Dougall, supra, at 649. The political powerlessness of undocumented children is further exacerbated by the fact that they are minors and must rely on their parents to protect their interests.

Moreover, the classification, as indicated earlier, is based, like race, national origin, illegitimacy, on a characteristic over which the children have no control [11/] and violates a fundamental concept in the American scheme of justice that individuals are to be free of legal disabilities in the absence of personal guilt. St. Ann v. Palisi, 495 F.2d 423, 425-426 (5th Cir. 1974). The statute

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11/ See Weber v. Aetna Cas. & Sur. Co., supra, at 175-76 (illegitimate children have no control over their status and ought not be made to suffer on account of it).

creates legal and practical burdens for undocumented children for reasons totally unrelated to their worth as individuals. Consequently, these children fit the criteria this Court has set which warrant the extraordinary judicial protections afforded a suspect class.

3. Section 21.031 Should Be Subject To Strict Scrutiny Because It Effectively Denies Education Totally To Undocumented Children.

Finally, strict scrutiny is the appropriate standard of review when legislative action burdens constitutionally protected fundamental rights and interests. Memorial Hospital v. Maricopa County, 415 U.S. 250, 258 (1974); San Antonio Independent School District v. Rodriguez, supra, at 33-34; Shapiro v. Thompson, 394 U.S. 618, 634 (1969). In Rodriguez, supra, at 36-37, this Court examined whether a state

financing scheme that created financial disparities among school districts violated the Equal Protection Clause. While upholding the Texas scheme of financing, and rejecting arguments that any differences in the provision of education be subject to strict scrutiny, the Court expressly left open the questions of whether the absolute denial of education might impinge on a constitutionally protected right. Id. at 36-37.

The situation of undocumented children in Texas schools differs radically from the circumstances of the children in Rodriguez. In contrast to the differential spending levels involved in Rodriguez, Section 21.031 effectively denies education to all undocumented children. In upholding the financing scheme in Rodriguez, this Court noted that its

underlying purpose was to extend and improve education. Id. at 39. By contrast, the purpose and effect of Section 21.031 is to selectively deny education to a class of politically unpopular children. Consequently, this case squarely presents the question left open in Rodriguez.

As was pointed out by Justice Powell in Rodriguez, supra, education is not afforded "explicit protection under our Federal Constitution." Id. at 35. However, a right need not be explicitly mentioned in the Constitution to be considered fundamental. "Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." Id. at 34-35. [emphasis added]

The importance of education in the twentieth century cannot be overstated. This Court has long recognized the importance of education in this society and the central role of the government in providing it. Wisconsin v. Yoder, 406 U.S. 205 (1972); Brown v. Board of Education, 347 U.S. 483 (1954); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). In Brown v. Board of Education, supra, this Court, in striking down the "separate but equal" system of public education stated:

> "Today education is perhaps the most important function of state and local governments.... Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and

> in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. at 493. [emphasis added]

Elsewhere it has been recognized by this Court that an individual can be severely harmed as a result of the denial of education for more than a "trivial" period. Goss v. Lopez, 419 U.S. 565, 576 (1975) (ten-day suspension).

Education is also important with respect to the enjoyment and exercise of rights that are clearly protected by the Constitution. See generally, San Antonio v. Rodriguez, supra, at 36-37. Education of some minimum level is necessary for exercising freedom of speech, petitioning government, and due process

of law. First Amendment rights have been recognized as fundamental. Cox v. Louisiana, 379 U.S. 559, 563 (1964). See also De Jonge v. Oregon, 299 U.S. 353, 364 (1937). The right to due process is expressly guaranteed in the Fifth Amendment and extends to illegal aliens. Shaughnessy v. United States, supra, at 213-214. Total denial of education as would be occassioned by Section 21.031, would leave undocumented children without basic skills necessary to protect themselves through the exercise of such rights.

Education is important not only with respect to individual development and the exercise of constitutionally protected rights. Education is important for the maintenance of our social order. Amback v. Norwick, supra, at 75-77; Wisconsin v.

Yoder, supra, at 221. Education is an essential element in the process which prepares individuals to participate in society in a meaningful and productive way. Brown v. Board of Education, supra, at 493.

The evidence produced in the district court proceedings below established that the class of undocumented children who are effectively excluded from education by Section 21.031 will not soon leave Texas or the United States. 12/ The disparities between the economic conditions in Mexico and the United States that have drawn this group into this country will not soon change. The

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12/ Doe v. Plyler, 458 F. Supp. 569, 577-78 (E.D. Tex. 1978); In re Alien Children Ed. Litigation, 501 F. Supp. 544, 562 (S.D. Tex. 1980).

practical realities of the inability of federal authorities to effectively and strictly enforce the Immigration and Naturalization Act means that undocumented children as a class will continue to reside in Texas. Moreover, it is also clear that a large percentage of the children in Texas who today are undocumented will become lawfully resident aliens in the near future. Doe v. Plyler, supra, 458 F. Supp. 560, 577-78 (1978).

The failure to provide education to this class of individuals will result in the creation of a sub-group within our midst who are condemned to ignorance, and who will look to public sources or crime to meet their day-to-day needs of food and shelter. The end result of such discrimination will be the increased,

long term drain on governmental resources and, more important, the loss of valuable human resources that have been reduced to wasted lives.

4. Section 21.031 Cannot Be Sustained Under A Strict Scrutiny Examination.

Classifications which are suspect in nature or which impact upon fundamental rights or interests are subject to "the most rigid scrutiny", Loving v. Virginia, 388 U.S. 1, 11 (1967). A state must show that the classification is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The classification created by Section 21.031 cannot withstand this stringent examination.

The State of Texas has asserted two bases or interests to be served by §21.031

as it relates to undocumented children:

1. The preservation of the state's limited educational resources and their expenditure to lawful residents; and
2. The reduction of incentives for illegal immigration.

AOB 25

This Court has repeatedly held that discrimination cannot be sustained where the claimed interest of the state involves simply the savings of dollars or the reserving of those dollars for particular groups. 13/

13/ See Nyquist v. Mauclet, supra, at 12; Memorial Hospital v. Maricopa County, supra, at 374-75; Shapiro v. Thompson, supra, at 638.

The stated interest of Texas in preserving education funds for some children residents of Texas is not a sufficient basis for making a distinction as invidious in nature as the one which would single out undocumented children for differential treatment. This is especially true given the importance of education to the development of these children, the importance of maintaining our social fabric and the fact that undocumented aliens do contribute to the taxes which are the source of funding for public education in Texas.

The second interest proffered by Texas is an impermissible goal for the State and inconsistent with federal authority. In Nyquist v. Mauclet, supra, the state of New York had asserted, as a basis for

banning certain resident aliens from state financial assistance for higher education, that the provision was an incentive for aliens to become naturalized. Id. at 9. This Court stated that such a purpose was not a permissible one for the state: "Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere." Id. at 10. (Citing U.S. CONST., art. 1, §8, cl. 4; Mathews v. Diaz, supra, at 67, 84-85; Graham v. Richardson, supra, at 376-80; Takahashi v. Fish and Game Comm'n, supra, at 419.) Cf. DeCanas v. Bica, 424 U.S. 351 (1976). Likewise, in this situation, state legislative attempts to provide disincentives to illegal immigration are outside the scope of state authority.

In summation, Section 21.031 creates

a classification which is both invidious and pernicious in nature. It burdens innocent children for the conduct of their parents. At the same time the statute effectively denies these children access to one of the most basic services provided by government today, education. Not only is education vital to the success of any individual, it is the cement of a democratic society. Texas in defense argues that Section 21.031 is necessary to save money. Such a defense cannot withstand judicial scrutiny. Surely, we are at a stage in the development of our country when human life has value beyond dollars and cents and the guarantees of the Fourteenth Amendment's Equal Protection Clause can reach naturally to encompass innocent children.

B. SECTION 21.031 IS INVALID UNDER AN INTERMEDIATE STANDARD OF REVIEW

While this Court has never explicitly employed a standard of review other than "strict scrutiny" or "national basis", and remains reluctant to do so, Rostker v. Goldberg, __ U.S. __, 49 U.S.L.W. 4798, 4801-02 (1981), several decisions demonstrate the Court's application of an intermediate standard of review where certain classifications have been used and where important, if not "constitutionally fundamental", interests have been adversely impacted. This Court has applied a more "focused" review, Craig v. Boren, 429 U.S. 190, 210-11 (1976)(Powell, J., concurring), where classifications have been employed based on sex, Craig v. Boren, supra; Stanton v. Stanton, 421 U.S. 7 (1971); and illegitimacy, Trimble v.

Gordon, supra; Mathews v. Lucas, supra; Weber v. Aetna Casualty & Surety Co., supra. Also subject to a heightened review have been classifications which deny to persons certain benefits basic to survival. Hampton v. Mow Sun Wong, 426 U.S. 88, 103-103 (1976)(eligibility for employment in a major sector); United States v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring)(food stamps subsistence benefits).

The arguments in support of an intermediate level of review are much the same as the arguments in support of the utilization of the "strict scrutiny" standard. The criteria used by the State of Texas in Section 21.031 is aimed at a group with a history of disadvantageous treatment similar to racial and ethnic minorities, illegitimate children and aliens

generally. They share with the aforementioned groups political powerlessness and societal approbation sufficient to elicit a review of Section 21.031 by this Court of a heightened nature.

Additional justification for a more focused review of Section 21.031 is the fact that the classification impacts on an interest that this Court has recognized as being basic to individual development. The sentiments expressed in Brown v. Board of Education, supra, are as compelling, if not more so, today as they were then, because the present case involves a total denial of education opportunity and are not simply a matter of relative deprivation of education as was the case in Brown, supra, and Rodriguez, supra.

To withstand constitutional challenge

under an intermediate review, a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, supra, at 197. The Texas statute does not meet this test.

Texas' stated interest in preserving the fiscal integrity of its public program, AOB 25, is not substantially met by the classification in Section 21.031. The State of Texas conducted no studies to discern what fiscal impact undocumented children might have on the schools in Texas. In re Alien Children Education Litigation, supra, 501 F. Supp. at 574.

The fiscal savings which would accompany the exclusion of undocumented children from public education are unknown and illusory at best. The findings of both district court below and the

Fifth Circuit are that undocumented children are no more a drain on education resources than are citizen and lawfully resident alien children. Doe v. Plyler, supra, 458 F. Supp. at 589; 628 F.2d at at 461 n. 34; In re Alien Children Education Litigation, supra, at 583 n. 104. The educational needs of even monolingual Spanish speaking undocumented children are similar to those of recently admitted lawful resident alien children and large numbers of citizen children of Mexican-American ancestry. The Texas school system is already providing programs to meet the needs of undocumented children, English speaking or Spanish speaking.

C. SECTION 21.031 IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

Appellees in Plyler v. Doe, No. 80-1538, have extensively brief this issue. Amicus concurs with and supports the arguments stated by Appellees that Section 21.031 is not rationally related to a legitimate state interest.

III. TEXAS EDUCATION CODE SECTION 21.031 MUST BE PREEMPTED BY FEDERAL LAW

A state law which discriminates against undocumented aliens is preempted by federal law if either of three tests are met. First, it is preempted if "Congress has unmistakenly so ordained." DeCanas v. Bica, 424 U.S. 351, 356-358 (1976). Second, it is preempted if "the regulated subject matter permits no other conclusion". Id. at 356. Third, it is

preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 363; Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

In DeCanas v. Bica, this Court held that a California statute which prohibited employers from hiring "illegal aliens" under certain conditions was not preempted under either of the first two tests. Id. at 356. This Court did not analyze the statute under the third test, but rather remanded the case for that analysis. Prior to DeCanas, this Court held in Hines v. Davidowitz, supra, that a state law requiring aliens to register was preempted under the third test.

The Texas statute at issue differs significantly from the statute before

the Court in DeCanas. Section 21.031 impacts directly on undocumented children and deals with areas of federal immigration and education policies embodied in the Immigration and Naturalization Act [8 U.S.C. §1101 et seq.] and Title 1 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. §241 et seq.].

The supremacy of federal power to regulate immigration is unquestioned. DeCanas v. Bica, at 354; Hines v. Davidowitz, supra, at 62. Although regulation of education, like employment, is generally a matter of local concern, such regulation "must give way to paramount federal legislation." DeCanas v. Bica, supra, at 357. In areas of unquestioned vital significance to the nation as a whole, such as foreign affairs, which

itself encompasses the regulation of aliens and immigration, state legislation is particularly susceptible to preemption. MITE Corp. v. Dixon, 633 F.2d 486, 491 (7th Cir. 1980) Prob. Jur. noted, __ U.S. ___, 101 S.Ct. 1510, 68 L.Ed.2d 347 (1981); Hines v. Davidowitz, supra, at 62; Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952). Where federal legislation is paramount, this Court has not hesitated to preempt state statutes regulating matters of local concern. 14/ Although Congress did

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14/ See: Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) (state statute which discriminated against nonresidents and aliens regarding fishing in state territorial waters preempted by federal law); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (federal law preempts division of benefits under Railroad Retirement Act); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (application of state tax to non-Indian logging company operating on Indian reservation preempted by

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not expressly prohibit the state statute at issue, this statute impacts on both immigration and education policies. When analyzed under the latter two preemption tests, the statute must be invalidated.

A. THE NATURE OF THE SUBJECT MATTER REGULATED REQUIRES THAT IT BE PREEMPTED UNDER THE IMMIGRATION AND NATURALIZATION ACT.

Under the second test, preemption is implied from the structure and purpose of Congressional enactments. City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973); MITE Corp. v. Dixon, supra, 633 F.2d at 490-92. This inquiry requires consideration of the relation-

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14/ (cont. from previous page) federal law); McCarty v. McCarty, __ U.S. __, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) (federal law preempts division of military retirement pay pursuant to state community property laws).

ship between state and federal law as they are interpreted and applied, not merely as they are written. MITE Corp. v. Dixon, supra, at 491; DeCanas v. Bica, supra, at 363-65.

"The authority to control immigration -- to admit or exclude aliens -- is vested solely in the Federal Government." Truax v. Raich, supra, at 42. The Immigration and Naturalization Act is concerned "with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." DeCanas v. Bica, supra, at 359. It is presumed that Congress intended to preempt state action in this area. Id. The conditions upon which an alien may be excluded or deported have been established by Congress. 8 U.S.C. §§1181-1227, 1251-1260. Congress has delegated

to the Attorney General and the Immigration and Naturalization Service the power to enforce the immigration laws and to regulate and supervise deportation. 8 U.S.C. §1103(a); Carlson v. Landon, 342 U.S. 524, 542-43 (1952). Changes in world politics and our internal economy affect the rights of various classes of aliens regarding admission and deportation. Carlson v. Landon, supra, at 534. Although illegal entry subjects an alien to criminal sanctions, deportation is the only sanction available for one whose presence in the country violates immigration laws. 15/

15/ If an alien has entered the country illegally, he is subject to criminal sanctions. 8 U.S.C. §1325; United States v. Doyle, 181 F.2d 479 (2nd Cir. 1950). Presence in the country in violation of immigration laws, however, is not a crime (cont. on next page)

Nothwithstanding the basic right of the federal government to deport aliens, Harisiades v. Shaughnessy, supra, at 587-88, this Court has recognized that deportation is a serious penalty that requires procedural safeguards. Bridges v. Wixon, 326 U.S. 135, 154 (1945). Similarly, Congress has recognized the need to ameliorate the impact of deportation and has established

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15/ (cont. from previous page)

and subjects one only to deportation. See Hines v. Davidowitz, supra, at 70; Abrams & Abrams, "Immigration Policy - Who Gets In and Why?", The Public Interest, Winter 1975, p. 23. See also C. Gordon & H. Rosenfeld, Immigration Law and Procedures, Vol. 2 (1977) §9-1 to 9-22 which lists civil and criminal violations but omits any mention of other punishment for one not lawfully in the country. See also Almeida-Sanchez v. United States, 413 U.S. 266, 276 (1973)(Powell, J., conc.) regarding the limited number of criminal prosecutions for illegal entry.

provisions that allow an otherwise deportable alien to remain in this country. 16/

16/ Available discretionary relief includes suspension of deportation, stay of deportation, adjustment of status, waiver of deportation and private bills. See Comment, "Alternatives to Deportation: Relief Provisions of the Immigration and Naturalization Act", 8 U.S.D. Law Rev. 323, 333-339 (1975). This Court in Elkins v. Moreno, 435 U.S. 647, 667 (1978), while noting that adjustment of status is a matter of grace and not right, cited the Board of Immigration Appeals: "Where adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc. will be considered as countervailing factors meriting favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion. [cites omitted] Id. [emphasis in original].

An alien who is in the country in violation of federal immigration law cannot be forced to leave the country until an order of deportation is obtained by the Attorney General. 17/ Thus, an undocumented alien is not necessarily a "deportable alien." 18/

17/ 8 U.S.C. §1252. Unless waived, one who is subject to deportation has a right to a formal hearing where the government has the burden of proving deportability. Navia-Duran v. Immigration and Naturalization Service, 568 F.2d 803, 811 (1st Cir. 1977); United States v. O'Rourke, 125 F. Supp. 769, 770 (W.D. Mo. 1954). As stated by this Court in Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953): "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."

18/ See In re Alien Children Education Litigation, 501 F. Supp. 544 (S.D. Tex. 1980) at 583 n. 103. "A 'deportable alien' is a person who has been found to be deportable by an immigration judge, or who admits his deportability upon questioning by official agents." United States v.

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An undocumented alien not under orders of deportation resides here at the grace of the federal government. See A.O.B. 20. As a consequence of the broad federal powers over immigration and naturalization, the federal government "enjoys rights to distinguish among aliens that are not shared by the States." Nyquist v. Mauclet, supra, at 7 n. 8. 19/

Here, Texas has created a legislative classification of undocumented children and has denied them education benefits.

18/ (cont. from previous page) Ortiz, 422 U.S. 891, 906 (1975)(Apprendix to Opinion of Burger, C.J., conc.).

19/ See also Moreno v. Toll, supra, at 658 (D. Md. 1980)(state law prohibiting non-immigrant aliens from consideration for in-state status while enrolled at state university preempted by federal law).

These children reside in Texas, are under no order of deportation, are not necessarily deportable, and are likely to remain permanently in this country. Certain Named and Unnamed Non-Citizen Children and their Parents v. Texas, supra, at 1328 (1980)(Powell, J., in chambers). Texas seeks to penalize a group of aliens who have been allowed by the federal government, to remain in the country. 20/ Moreover, the Texas statute requires each local school district to inquire into and determine each child's immigration status

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20/ Compare Graham v. Richardson, 403 U.S. 365, at 377-380 where this Court invalidated state laws which imposed on aliens auxiliary burdens in the form of denying them welfare benefits. Although the aliens in Graham were lawfully admitted and not subject to deportation, the alien children in the case at bar, though not lawfully admitted, are not necessarily deportable and are likely to remain permanently in the country.

outside the process which was set up by Congress to determine deportability. 21/ Northern Texas' use of federal immigration documents, or its reliance on determinations by the Immigration and Naturalization Service obviates this problem. As noted above, the federal government has the power to allow an otherwise deportable alien to remain in the country. Moreover, the Immigration Service's determination

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21/ School districts in Texas have adopted various policies to make such a determination. See In re Alien Children Education Litigation, supra, 501 F. Supp. 544, 553 (S.D. Tex. 1980). Compare: Doe v. Wright, 648 F.2d 432, 433 n. 2 (5th Cir. 1981) [Dallas School District]; Doe v. Plyler, 458 F. Supp. 569, 573 (E.D. Tex. 1978) aff'd, 428 F.2d 448 (5th Cir. 1980)[Tyler School District]. Such policies produce "[a] multiciplicity of tribunals and a diversity of procedures [which] are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." Garner v. Teamsters Local 776, 346 U.S. 485, 490-91

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certainly cannot be binding as the determination of whether an alien will be allowed to remain in the country when it is made at an advisory hearing at which the Service functions as a prosecutor. Cf. Ward v. Monroeville, 409 U.S. 57 (1972). Until found to be deportable, Texas cannot be allowed to interfere with the decisions of the federal government as to who is entitled to remain in the United States. 22/ To allow a state to deny an

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21/ (cont. from previous page)
(1953). In contrast, compare California Welfare and Institution Code §11104 which deprives aliens under federal order of deportation of state welfare benefits. See Harrington v. Obledo, 72 Cal. App. 3d 705, 713, 140 Cal. Rptr. 294, 299 (1977).

22/ Cf. Goss v. Lopez, supra, at 578, 80; Fuentes v. Shevin, 407 U.S. 67, 81 (1972) regarding the need for program procedures prior to being deprived of a protected property or liberty interest.

undocumented alien child an education prior to a determination that the child is to be deported, is to interfere with the purpose of federal immigration law. See Graham v. Richardson, supra at 378. 23/

The California statute before this Court in DeCanas had none of these consequences. That statute was directed at employers and prohibited them from hiring aliens who Congress had determined could not work in this country. DeCanas v. Bica, supra, at 363. The California statute did not

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23/ See Williams v. Williams, 328 F. Supp. 1381 (D.V.I. 1971), "To deny an alien access to our divorce courts on the sole ground that he may be in violation of an immigration law ... would attach a civil disability to some aliens without the prior benefit of the procedures designed for the purpose of enforcing the immigration laws. Id. at 1383. See also: N.L.R.B. v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978); N.L.R.B. v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979) (illegal aliens entitled to vote in union representation election).

require that the State determine an alien's immigration status. The State was required only to determine whether the employer knowingly hired such an alien. Finally, whereas the Federal Fair Labor Contractor Registration Act expressly allowed such supplemental state regulation (Id. at 361-62), there is no corresponding federal authorization in the field of education. To the contrary, the federal regulations under Title I of the Elementary and Secondary Education Act of 1965 [hereinafter Title I] forbid a state from inquiring into the immigration status of either a child or his parent. In re Alien Children Education Litigation, supra, 501 F. Supp. at 586.

Thus, although education is generally a matter of local concern, a state which denies education to a class of alien children residing in this country who are not under

order of deportation, who are not necessarily deportable, and who are likely to become permanent residents, enters into a forbidden area. Doe v. Plyler, supra, 458 F. Supp. at 592. After trial in Doe v. Plyler, supra, 458 F. Supp. 569 at 581 n. 14, Judge Justice stated:

> These children, and many more like them, are likely to remain here.... The federal government has chosen, whether by act or omission, not to deport them. Many of them have younger siblings who are American citizens and who may someday be the means of legalizing the presence of the whole family. Developments of federal immigration policy, such as President Carter's proposed amnesty plan, may legalize their status at a much earlier date. Id. at 581 n. 14.

State regulation in this area thus impinges on an area which is not a peripheral federal concern, but is an area which Congress has reserved for itself.

B. THE TEXAS STATUTE STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT TO CONGRESSIONAL IMMIGRATION AND EDUCATION POLICIES.

In determining whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" Hines v. Davidowitz, supra, at 67, this Court has invalidated state legislation that "frustrates the full effectiveness of federal law", Percy v. Campbell, 402 U.S. 637, 652 (1971); "betrays a general uncompatibility with basic federal objectives", Philadelphia v. New Jersey, 437 U.S. 617, 621 n. 4 (1978), or "whose consequences sufficiently injure the objectives of the federal program" to result in "frustration to federal policy", Hisquierdo v. Hisquierdo, supra, at 483. A conflict between state and federal law may exist despite the absence of any

literal inconsistency between them. Mobil Oil v. Dubino, 492 F. Supp. 1004, 1010 (D. Conn. 1980). See Hines v. Davidowitz, supra, at 66-67. Again, this Court must consider "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

With regard to immigration, as detailed above, Congress has enacted a comprehensive scheme of regulations. Graham v. Richardson, supra, at 378. Congress has entrusted the executive branch, through the Attorney General and the Immigration and Naturalization Service, with carrying out the immigration law. As such matters relate to the conduct of foreign relations, they are "so exclusively entrusted to the political branches of government as to be largely

immune from judicial inquiry or interference." Harisiades v. Shaughnessy, supra, at 589; Haig v. Agee, __ U.S. __, 101 S.Ct. 2766, 2774, 69 L.Ed.2d 640, 652-53 (1981). The fact that Congress has created and delegated authority to the Attorney General and the Immigration and Naturalization Service to carry out its statutory program is an important factor in any preemption analysis. Tribe, American Constitutional Law, §6-26 (1978).

In looking at such authority, this Court has recognized that federal policy is made by acts of omission as well as those of commission. Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978).

Under federal immigration policy, undocumented aliens have enjoyed a form of "de facto" amnesty. In re Alien Children Education Litigation, supra, 501 F.

Supp. at 559. The federal scheme is to regulate immigration at the border and not to penalize those undocumented aliens who have established roots in this country. Doe v. Plyler, supra, 458 F. Supp. at 591. As noted by this Court, local efforts to enforce our immigration laws affects our foreign relations. Hines v. Davidowitz, supra, at 66.

Here, Texas candidly admits that this statute is designed to stem unlawful immigration since there has been a "default of the legislative and administrative branches of the federal government." AOB 20, 28. This purpose was held, below, to be an impermissible basis on well-established precedents of this Court.

Immigration policy requires a uniform national system. Hines v. Davidowitz, supra, at 73. See also The Passenger

Cases, 48 U.S. 283 (1849); Henderson v. Mayor of New York, 92 U.S. 259 (1875). In Chy Lung v. Freeman, 92 U.S. 275 (1875) this Court invalidated a state board requirement for disembarking passengers as unconstitutional. 24/

More recently, in Nyquist v. Mauclet, supra, this Court invalidated a New York statute denying state college scholoarships to those aliens who refused to declare their intent to become citizens. 25/

24/ In Chy Lung v. Freeman, the Court stated: "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs with Congress, and not to the States. It has the power to regulate commerce with foreign nations; the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the National Government. Id. at 280. (emphasis added)

25/ In so ruling, this Court stated that the State purpose of encouraging persons to become citizens was "not permissible" as "control over immigration and naturali-

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The Texas statute has as direct an effect on immigration as the New York statute had on naturalization. 26/ "Such purposeful state regulation cannot be deemed to have a 'merely speculative or indirect impact on immigration'". DeCanas v. Bica, supra, at 356.

Second, with regard to education, the

25/ (cont. from previous page) zation is entrusted exclusively to the Federal government, and a state law has no power to interfere." Id. at 10. See also Examining Board v. Flores de Otero, supra, at 605.

26/ Certainly, if a state enacted laws which it believed would deter illegal immigration, such a policy would interfere with national policy in this area. For example, in addition to present procedures for relief from deportation and adjustment of statutes, both Presidents Carter and Reagan have proposed to Congress legislation to legitimatize the status of certain undocumented aliens. To allow states to create an underclass of undocumented aliens by denying undocumented children an education would certainly frustrate such national policies. See Doe v. Plyler, supra, 458 F. Supp. at 592 n. 30.

federal government, both through Congressional enactment of the Elementary and Secondary Education Act of 1965 and the adoption of various foreign treaties and accords, has adopted a federal educational policy designed to educate the disadvantaged. Title I provides for the distribution of federal funds to local schools to aid disadvantaged youth. 20 U.S.C. §241 (a). Nothing in the language of the statute, its regulations, or its legislative history indicates that Congress intended that a child's immigration status was to be considered. In fact, Title I specifically prohibits a state from inquiring into the immigration status of a child or his or her parent. (20 U.S.C. §2761 et seq.) In re Alien Children Education Litigation, 501 F. Supp. at 586.

This policy is consistent with the

international treaties and accords regarding education to which this country is a party. 27/ It is inconsistent for our nation to, on the one hand, pledge itself to the right of a free primary education and to the eradication of illiteracy in international forums and, on the other hand, to allow individual states to act in a manner inconsistent with our national policy. 28/

27/ Under the Protocol of Buenos Aires, the United States and other members of the Organization of American States, agreed to exert their greatest efforts to prevail compulsory free public education to all children. 21 T.I.A.S. 670, 672 (1970). Similarly, various other international instruments to which this country is a signatory espouse the right of a free primary education and the eradication of illiteracy. For a survey of these agreements, see In re Alien Children Education Litigation, supra, 501 F. Supp. at 591-94.

28/ See Oyama v. California, 332 U.S. 633, 649-50 (1948)(Black, J., conc.); Id. at 673 (Murphy, J., conc). Where state laws impair the effective exercise of the Nation's foreign policy, they are preempted. Zschernig v. Miller, 389 U.S. 429, 440 (1968).

Federal policies in both the education and immigration areas are burdened and frustrated by Section 21.031. To uphold this statute would be to sanction each of the fifty states to enact similar legislation. Compare Edwards v. California, 314 U.S. 160, 175-176 (1941). Because these children are likely to remain in this country for years to come, it would burden not only them but this Nation as a whole. See New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 432 (1973) (Marshall, J., dis.).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to affirm the judgments below.

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Dated: October 28, 1981.